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In the

Supreme Court of the United States

FRANK W. CASS AND
ROBERT W. STRAUSS,
Petitioners,

v.

THE YOUNGSTOWN SHEET AND TUBE COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. 1230

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

This brief is submitted on behalf of Respondent, The Youngstown Sheet and Tube Company, in opposition to the petition for writ of certiorari.

OPINION

The opinion of the United States Court of Appeals for the Fifth Circuit is reported in 329 F.2d 106. Such opinion is copied as Appendix A to the petition for writ of certiorari.

STATEMENT

The opinion of the Court of Appeals fairly states the case. However, the petition contains certain misstatements of the case and of the record herein, and there are certain salient facts to which we wish to direct the attention of the Court.

(1) Respondent contradicts the statement of Petitioner that he was denied or deprived of a hearing on the merits of his motion made pursuant to Rule 60(b) of the Federal Rules of Civil Procedure and that the only matter heard was the motion of Respondent to strike the motion of Petitioner and to strike the interrogatories filed by Petitioner.

The record reflects that the motion of Petitioner was called and heard on February 7, 1963. (Tr. 224-235) The order entered thereon expressly states that there "came on to be heard * * * (a) the motion of Frank W. Cass, filed herein on August 22, 1962, that there be vacated and set aside certain orders and the final judgment heretofore entered herein * * *" and such order expressly states that the Court heard and considered such motion (Tr. 234). The record further reflects that:

> (a) Petitioner never suggested prior to the writ of certiorari (and particularly he did not suggest to the District Judge) that he was denied or deprived of a hearing on his motion. On the contrary, he has stated that his motion was heard (Tr. 238), he filed a motion to "re-hear" such motion, and he has stated that his "motion for new trial" to re-hear his motion under Rule 60(b) was heard (Page 4 of Appellants' Brief in the Court of Appeals).
>
> (b) Petitioner has *never* offered or tendered one iota of evidence in support of his motion and has *never* sug-

gested that any evidence offered or tendered by him was rejected or that he was denied the opportunity to tender such evidence.

(2) Respondent contradicts the statement of Petitioner on page 3 of the petition that the motion of Petitioner was dismissed "without prejudice to the Petitioner to seek relief from the federal judgment in the state court". The order contains no statement of such import and states merely that the motion was overruled. (Tr. 234). The order overruling Petitioner's "motion for new trial" (to rehear his motion under Rule 60(b)) states simply that such motion "is in all respects denied". (Tr. 248) Neither order contains any reference to any other court.

(3) The Statement of Petitioner that Respondent was paid from the registry of the District Court a portion of the funds deposited therein without a trial on the validity of the claim of Respondent to such funds does not sufficiently state the extent and nature of the proceedings in the District Court. The record reflects that:

(a) such funds remained so deposited for almost two years;

(b) all parties were before the court and had fully pleaded;

(c) the payments made (including the payment to Respondent) from the registry were the result of a compromise and settlement between Respondent and the receiver vested with exclusive custody of those assets and affairs of Petitioner here involved; (Tr. 199)

(d) such settlement was fully heard and considered by the state court vested with jurisdiction of such as-

sets and affairs of Petitioner and in which such receiver was appointed; (Tr. 199)

(e) such compromise and settlement was in open court presented to the United States District Judge, upon application of such receiver, for approval, and such funds were distributed pursuant thereto; and

(f) the subject actions were called for trial in their regular order on the docket, after notice to all parties, and Petitioner was present in court upon the call of such cases. (Tr. 158)

(4) Although the petition has incorrectly been styled "Frank W. Cass and Robert W. Strauss, Petitioners, v. The Youngstown Sheet and Tube Company, Respondent", the text thereof (see page 1 of the petition) and the signatures to such petition reflect that such writ is sought solely by Frank W. Cass.

ARGUMENT

1. An examination of the petition, of the opinion of the Court of Appeals, and of the record herein reflects that this case involves only procedural points and does not meet the requirements of Rule 19 of this Court.

2. Prior to the filing of the motion under Rule 60(b) Petitioner had already had his "day in court" on the precise, identical matters he sought to have heard further in connection with such motion. The only matters alleged in his motion (which referred to the validity of the debt owed Respondent) were alleged by him in and were the subject of four separate suits extending over a period of years. (In the interest of brevity and to avoid repetition, a detailed discussion of such prior proceedings is not set forth here. We

respectfully refer the Court to pages 2 through 7 and 28 through 31 of the brief of Appellee in the Court of Appeals.) The "discovery" he now says he was denied was available to him on such identical matters and issues in each of such suits for a period of years, and he studiously avoided the opportunity of having the same heard or of seeking discovery. Proof by Petitioner of every contention urged by him subsequent to the final judgment in the District Court would not entitle him to relief under Rule 60(b), since each of the same had previously been urged and he had had every opportunity for discovery prior to such judgment.

Further proceedings or hearings on such matter are expressly precluded by the principle of cases such as *Toledo Scale Company v. Computing Scale Company*, 261 U.S. 399. In a virtually identical situation Justice Taft stated:

> "* * *After all parties have had a full and fair opportunity to prepare their cases (the Court will refuse) to permit them to drag out litigation by bringing in new evidence which, with due diligence, they ought to have discovered before the hearing* * *"

See also *Doudy v. Haufield*, 189 F.2d 637; *A.T. & S.F. Ry. v. Barrett*, 246 F.2d 846; *Ira S. Bushey & Sons v. W. E. Hedger Transp. Corp.*, 167 F.2d 9; and *Stiers v. Martin*, 277 F.2d 737.

3. The only reason urged by Petitioner for relief under Rule 60 (b) was his baseless suggestion that the debt sued for by Respondent was not due. (Tr. 163-165). An allegation that a Plaintiff accepted payment of a sum less than the amount for which such party had sued, in spite of a con-

tention of one party that the debt was not due, does not constitute an allegation of "fraud" within the contemplation of Rule 60(b). See *Toledo Scale Company v. Computing Scale Company*, supra, by this Court, where it was stated that a plea that a suit was "prosecuted by an unscrupulous competitor, conscious all the time of its falsity and injustice" was not a plea of "fraud" sufficient to set aside the judgment, and *England v. Doyle*, 281 F.2d 304, where it was stated that failure to disclose to the district judge that the bankruptcy court had already taken a particular action did not constitute "fraud" within Rule 60(b), since the "fraud" must consist of an "unconscionable plan or scheme" which improperly influenced the court.

In support of his contention that his motion sufficiently alleged "fraud", Petitioner, on page 9 of his brief, refers to and quotes from *Market v. Swift and Co., Inc.*, 173 F.2d 517. The quoted language is taken entirely out of context and does not appear in any portion of the opinion concerning itself with Rule 60(b). The quoted language appears in the first, opening paragraph of the opinion, and the Court did not say, as suggested by Petitioner, that the appellant in that case was entitled to further proceedings under Rule 60(b). The Court pointed out that Rule 60 had been included in the "telescoping" provisions of the prayer and it was not necessary to even consider such Rule.

Whether or not a particular debt is due is the ultimate issue for determination in virtually every case instituted in courts of civil jurisdiction. If the Court holds that a mere

allegation that the debt disposed of or resolved was not due constitutes an allegation of "fraud" within the contemplation of such Rule, the Court will have held that every party to every suit for debt and money judgment can attack the judgment under Rule 60(b) and seek additional discovery, after a full trial and final judgment, on the mere hope or dream of finding something new. Thus, *no* suit for debt will ever be disposed of until there has been held a full trial and, in addition, a full re-trial and exploration under the guise of such Rule.

4. The relief contemplated by Rule 60(b) is extraordinary and may be invoked only upon a showing of exceptional circumstances. The Rule cannot be substituted for appeal or other process for relief which a party chooses not to take. It is not intended as a means to provide relief from an alleged error of the district court. *Flett v. W. A. Alexander & Co.*, 302 F.2d 321, certiorari denied, 371 U.S. 841; *Title v. U.S.*, 263 F.2d 28, certiorari denied, 359 U.S. 989, rehearing denied, 360 U.S. 914. No such circumstances exist herein. Petitioner had many opportunities and other avenues to pursue prior to the filing of the subject motion by which he could have had determined the validity of Respondent's claim or by which he could have had corrected any error allegedly committed. The record reflects that he pursued various courses designed solely to prevent a final judgment.

5. Motions pursuant to Rule 60(b) lie entirely within the province of the discretion of the District Judge. Such rule contains no mandatory provisions. It states only that the

trial court *may* set aside his prior actions. *Johnson v. Masonic Bldg. Co.*, 138 F.2d 817, certiorari denied, 321 U.S. 780. It has been consistently held that the actions of the District Judge in such matters are normally beyond appellate review. See, e. g., *Flett v. W. A. Alexander & Co.*, supra; *Title v. U.S.*, supra; *Securities and Exchange Commission v. Farm and Home Agency, Inc.*, 270 F.2d 891, certiorari denied, 362 U.S. 903; *Cole v. Fairview Development*, 226 F.2d 175, certiorari denied, 350 U.S. 995; *Johnson v. Masonic Building Company*, supra; *Nederlandsche Handel—Maatschappij, N.V. v. Jay Emm, Inc.*, 301 F.2d 114; *Fulenwider v. Wheeler*, 262 F.2d 97; and *Seismograph Service Corporation v. Offshore Raydist, Inc.*, 263 F.2d 5. Such discretion is essential to prevent harrassment and the useless prolongation of litigation over matters that have been concluded. Particularly will the judgment of the appellate court not be substituted for the discretion of the trial court where the motion under Rule 60(b) is heard by the same judge who heard, and is familiar with, prior proceedings in the case. *A.T. & S.F. Ry. v. Barrett*, supra.

The hearing of motions made pursuant to Rule 60(b) on the motions and arguments, without additional evidence, is proper and not unusual, and lies within such discretion of the trial court. See *Securities and Exchange Commission v. Farm & Home Agency, Inc.*, supra, where the appeal was from an order denying a motion for leave to file a motion under Rule 60(b), and *Cole v. Fairview Development*, su-

pra, where, as in the instant case, the complaining party had settled a case and then changed counsel, who sought to undo the acts of his predecessor.

Such discretion was in no way abused in this action. At the time the settlement was made and effected the consolidated cases had been pending almost two years. The trial court had the benefit of the entire record and the pleadings (including those pleadings raising the same issues in various instances over such period). *No* evidence was offered and *no* suggestion was made that Petitioner desired to present any evidence. The action of the District Judge was the only possible action to be taken on the motions.

6. This petition for writ of certiorari has been sought solely by Frank W. Cass.

The record reflects that prior to the institution of these actions a receiver was appointed by the state court "to take charge of the business properties, assets, books and records of the partnership of Payne and Cass, Cass and Payne and or Thunderbird Drilling Company", including the subject properties and debt. (Tr. 197). The record further reflects that such appointment is still in force and effect and such receiver is still functioning in such capacity. (See, e.g., page 2 of Appellant's brief in the Court of Appeals).

Under the law of the State of Texas such receiver was and is possessed with the exclusive control and custody of the assets and affairs of the partnership. Article 2297, Revised Civil Statutes of Texas. This principle has been consistently conceded by Petitioner. All parties to the state

court action, including Petitioner (upon whose application the receiver had been appointed) were bound by the actions of such Receiver taken pursuant to the order of the state court. *Spence v. State National Bank of El Paso*, 5 S.W.2d 754; *Eaton v. Whisenant*, 50 S.W.2d 1109; *Scott v. Farmers & Merchants National Bank*, 97 Tex. 31, 75 S.W. 7, Davis v. Mitchell, 225 S.W. 1117; and *T. & P. R.R. Co. v. Griffin*, 76 Tex. 441, 13 S.W. 471, affirmed, 151 U.S. 105.

If these actions in the United States District Court had been solely between Respondent and such Receiver, Petitioner would have been bound by any action therein, including a final judgment or compromise. Such receiver was the only person vested with authority to settle the subject dispute on behalf of the partnership and the joinder of Petitioner therein or his consent thereto was not and is not required. Petitioner did not possess the power to present a motion to set aside the act of such receiver and the receiver did not move to set the same aside. Petitioner does not now possess the power to take any action in connection with such debt, such funds, or such settlement, including the petition to this court. The sole person vested with such power has not petitioned this court for writ of certiorari and has not sought to appeal or otherwise set aside the action of the Court of Appeals.

7. The Court of Appeals did not hold or suggest, as is erroneously stated by Petitioner, that discovery is not available in connection with an motion made pursuant to Rule 60(b). Such Court merely held that the discovery sought

by Petitioner in connection with this motion was not available to him because his pleadings and the record did not justify it.

8. The petition for writ of certiorari is frivolous, does not meet the requirements of Rule 19 of this Court, and is wholly without merit. As has been true of most of the actions of Petitioner in this litigation since its inception, such petition has been filed solely to defer the full and final conclusion of this litigation and to harass, inconvenience, and create expense for Respondent. As is reflected by the record and the opinion of the Court of Appeals, Respondent accepted in settlement of its claim an amount substantially less than the amount sued for and due. Pursuant to Rule 56 of this Court, appropriate damages should be awarded to Respondent to compensate it for its additional expenses in connection herewith.

WHEREFORE, Respondent prays that the petition for writ of certiorari be denied, that this litigation be fully and finally concluded, and that it be awarded damages as provided by Rule 56 of this Court.

Respectfully submitted,

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